FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 27 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946.

No. 1070

JOSEPHINE M. MOSS, Administratrix of the Estate of Nicholas John Moss, Deceased,

Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

OWEN W. CRUMPACKER,
JAY E. DARLINGTON,
300 Hammond Building,
Hammond, Indiana,
Attorneys for Petitioner.

FREDERICK C. CRUMPACKER,
Of Counsel.

INDEX.

Subject Index.

	PAGE
Table of cases	ii
Reference to official reports	19
Concise statement of jurisdiction	8
Specification of errors (question presented)	8
Argument	9
Conflict with precedents	9
Conflict among decisions	12
Departures in procedure	14
Erroneous construction of Rule 50b	17
Violation of Seventh Amendment	17
Conclusion	18
Appendix	19
Circuit Court's opinion in first appeal	19
District Court's opinion on remand	33
Circuit Court's opinion in second appeal	37
Rule 50b of Federal Rules of Procedure	40

TABLE OF CASES.

Baltimore & Carolina Line v. Redman, Inc. (1935), 295 U. S. 654, 55 S. Ct. 890 ..... 10, 38

Berry v. United States, 312 U. S. 450, 61 S. Ct. 637 3

Conway v. O'Brien, 312 U. S. 492, 61 S. Ct. 634 3

Fleniken v. Great Amer. Indemnity Co. (1944), 142 F. 2d 938 ..... 4, 12

Gypsy Oil Co. v. Escoe, 275 U. S. 498, 48 S. Ct. 112 3

Halliday v. United States, 315 U. S. 94, 62 S. Ct. 438 3

Huguley Mfg. Co. v. Galeton Cotton Mills, 184 U. S. 290, 22 S. Ct. 252 3

Illinois Power & Light Corp. v. Hurley (1931), 49 F. 2d 68 ..... 4, 12

Madden Furniture, Inc. v. Metropolitan Life Ins. Co. (1942), 127 F. 2d 837 ..... 4, 12, 35

Montgomery Ward & Company v. Duncan, 311 U. S. 243, 61 S. Ct. 189 ..... 10, 38

Rodgers v. Hill (1933), 289 U. S. 582, 53 S. Ct. 731 ..... 4, 11

Roth, et al. v. Hyer (1944), 142 F. 2d 227 ..... 4, 12

Slocum v. New York Life Ins., 228 U. S. 364, 33 S. Ct. 523 ..... 4, 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946.

No.

JOSEPHINE M. MOSS, Administratrix of the Estate of Nicholas John Moss, Deceased,

Petitioner,

VS.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

May it Please the Court:

Statement of Matter Involved.

Petitioner respectfully represents to the court that she recovered a verdict and judgment in the District Court for the Northern District of Indiana, in the sum of Seventy Five Hundred ($7500.00) for the wrongful death of her husband. Jurisdiction was based upon diversity of citizenship. By two to one decision, this verdict and judgment were reversed generally and without direction (Tr.

1 & 2) by the United States Circuit Court of Appeals for the Seventh Circuit, because the evidence showed that your petitioner's husband was guilty of contributory negligence as a matter of law. *Josephine Moss, Administratrix* v. *The Pennsylvania Railroad Company,* 146 F. 2d 673. (See opinion in appendix). A petition for certiorari was denied by this court on May 21, 1945. *Josephine Moss, Administratrix* v. *The Pennsylvania Railroad Company,* 325 U. S. 861, 65 S. Ct. 1200. Without a further trial and on motion of the defendant (Respondent) the District Court entered judgment upon remand in favor of the defendant (Tr. 4-6 inc.). On further appeal this action of the District Court was affirmed with opinion (Tr. 21-22). (Opinion printed in appendix). It is this decision which your petitioner assigns as error, and earnestly prays that this court issue a writ of certiorari to review.

Jurisdiction to Review.

Your petitioner respectfully represents further that this court has jurisdiction to review the judgment in question under Section 240 (a) of the Judicial Code as amended by Act of Congress under date of February 13, 1925, 43 Stat. 936, 28 U. S. C. A. 350. The judgment complained of also involves what your petitioner earnestly contends to be an erroneous construction of Rule 50b of the Federal Rules of Civil Procedure.

The judgment sought to be reviewed was rendered on November 6, 1946 (Tr. 23). A petition for rehearing was duly filed on November 21, 1946 (Tr. 23) and denied on December 3, 1946 (Tr. 24). This petition is being filed within three months after the judgment (deducting the period during which the time for the filing of this petition was suspended by the pendency of the peti-

tion for rehearing). *Gypsy Oil Co.* v. *Escoe,* 275 U. S. 498, 48 S. Ct. 112. The judgment of the Circuit Court of Appeals was final and may be reviewed by certiorari. *Huguley Mfg. Co.* v. *Galeton Cotton Mills,* 184 U. S. 290, 22 S. Ct. 252.

Petitioner further states that the questions involved are of peculiar gravity and of general importance to the practice. The judgment of the District Court, as affirmed by the Circuit Court of Appeals, in a purported effort to avoid re-trials, has gone to extremes not yet found in the written opinions, in holding that a general reversal of a verdict and judgment authorizes the District Court to peremptorily enter judgment in favor of the losing party upon remand without a jury trial. Again, *Rule* 50b of the Federal Rules has been before this court often in recent years for clarification, but the decisions of the Circuit Court of Appeals have been reversed in each instance upon other grounds, and without passing upon the procedural matters involved. *Conway* v. *O'Brien,* 312 U. S. 492, 61 S. Ct. 634, *Berry* v. *U. S.,* 312 U. S. 450, 61 S. Ct. 637, *Halliday* v. *U. S.,* 315 U.S. 94, 62 S. Ct. 438. The instant case clearly demonstrates the very important need for further clarification of the Rule: Assuming the Circuit Court had power to direct the entry of a judgment in favor of the losing litigant in a jury case but failed to do so—does the District Court succeed to that power on general reversal and remand without specific delegation because of *Rule* 50b?

Appended hereto are the relevant opinions of the District Court and the Circuit Court of Appeals.

Questions Presented.

Your petitioner represents that there is substantially only one question presented: The error of the Circuit Court of Appeals in affirming the action of the District Court in entering judgment for the defendant, upon motion, in a jury case without a further trial after a general reversal and remand without direction of a verdict and judgment in favor of the plaintiff (your Petitioner).

Reasons for Allowance of Writ.

Petitioner submits the following reasons for the allowance of the writ of certiorari:

1. The Circuit Court of Appeals for the Seventh Circuit in deciding a federal question ignored at least two ruling precedents of this court, namely; *Slocum* v. *New York Life Insurance Company,* 228 U. S. 364, 33 S. Ct. 523, and *Rodgers* v. *Hill,* 289 U. S. 582, 53 S. Ct. 731.

2. The decision in question is in direct conflict with the decisions of other Circuit Courts of Appeal, and particularly the decision of the Circuit Court of Appeal for the Eighth Circuit in *Illinois Power & Light Corp.* v. *Hurley* (1931) 49 F. 2d 681. Also *Madden Furniture, Inc.* v. *Metropolitan Life Insurance Company* (1942) 127 F. 2d 837 (5th C.C.A.); *Fleniken* v. *Great Amer. Indemnity Co.,* (1944) 142 F. 2d 938; (5th C.C.A.); *Roth et al.* v. *Hyer* (1944) 142 F. 2d 227 (5th C.C.A.).

3. The decision of the Circuit Court of Appeals has sanctioned so far a departure from the usual course of judicial proceedings by a District Court as to call for an exercise of this court's power of supervision. The District Court interprets Rule 50b of the Rules of Civil Procedure to mean that where a verdict and judgment have been reversed generally and without express direc-

tion, there is an implied direction that a motion *non obstante veredicto* made prior to the appeal and denied should be reinstated, reconsidered, and sustained without further consideration. The only remedy in practice for such an interpretation of *Rule* 50b is for the prevailing party in a jury case to file a motion for new trial and assign cross-errors on appeal. In other words, such a party must impeach a verdict in his favor in order to avoid the otherwise fatal consequence of a general reversal without direction.

This procedure, upon close inspection, would be futile from the standpoint of practicing attorneys charged with the primary responsibiilities to the litigants, and, who, prior to these decisions, understood a "general reversal" to mean just that.

4. The decision of the District Court as affirmed by the Circuit Court of Appeals places a new and erroneous construction on *Rule* 50b of the Federal Rules of Procedure. While recent decisions have held that the reviewing court has power to direct judgment in favor of the losing party in the court below in a jury case under *Rule* 50b, the decision sought to be reviewed goes further in holding that where the reviewing court has not exercised this power it is re-delegated back to the trial court after reversal.

5. Your petitioner has been deprived of her constitutional right to a jury trial. A general reversal without direction places the case back before the trial court as though no trial had occurred. While the trial court is bound by the law established on appeal as it applies to the second trial, it cannot ignore the right to a jury determination upon the disputed facts involved, and forth-

with enter complete and final judgment against the plaintiff and in favor of the adversary.

Conclusion.

Wherefore, your petitioner respectfully prays that her petition be granted, and that a writ of certiorari issue, pursuant to this petition, to the Circuit Court of Appeals for the Seventh Circuit directing it to send up the record of the proceedings had there in this cause for review by this Honorable Court.

Josephine M. Moss, Administratrix of the Estate of Nicholas John Moss, Deceased,

By: Owen W. Crumpacker,
Jay E. Darlington,
Her Attorneys.

FREDERICK C. CRUMPACKER,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946.

No.

JOSEPHINE M. MOSS, Administratrix of the Estate of Nicholas John Moss, Deceased,
Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

May it Please the Court:

Official Reports.

The opinion and judgment in the first appeal appears in 146 F. 2d 673. The District Court's memorandum opinion appears in the printed transcript filed in this court at pages 4 to 6, inclusive, and 68 F. Supp. 740. The opinion of the Circuit Court of Appeals in the second appeal appears in 158 F. 2d 86. For the convenience of the court these three opinions are set forth *verbatim* in the appendix to this petition and brief.

Concise Statement of Jurisdiction.

The concise statement of this court's jurisdiction appears in the formal petition, *supra.*

Specification of Errors.

The only error specified appears in the formal petition under "Questions Presented", *supra.*

ARGUMENT.

Conflict with Precedents of This Court.

Petitioner has consistently argued that the case of *Slocum* v. *New York Life Insurance Company*, 228 U. S. 364, 33 S. Ct. 523, has never been overruled in so far as it authorized and required a new trial in the District Court after the general reversal of the verdict and judgment originally rendered in your petitioner's favor. Respondent in appealing from the adverse decision assigned numerous specifications of error including the denial of its motion *non obstante veredicto* and the denial of its motion in the alternative for a new trial.* All it sought on appeal was a general reversal. In granting this prayer the Circuit Court of Appeals quite obviously was concerned in its opinion (see appendix) only with the question of the contributory negligence of petitioner's decedent, the negligence being admitted. Its mandate di-

---

* Your petitioner takes exception to the Circuit Court's statement in the second appeal that "*the error assigned* was the overruling of a motion for a directed verdict and the denial of a motion for judgment notwithstanding the verdict" (Tr. 21). Such a mis-statement tends to support the District Court's action by smothering the actual fact that there were fourteen separate and independent errors assigned in the initial appeal including the overruling of defendants' motion for a new trial. While the specifications of error appear only in the transcript in the first appeal, which, perhaps, is not before this court, except by judicial notice, the specifications of error do appear in the transcript in Cause No. 1182 (Oct. Term 1944) in this Court at pages 237 to 247, inclusive.

rected "such further proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said judgment notwithstanding" (Tr. 2). Thereupon the trial court entered final judgment (Tr. 5). That the *Slocum* case was completely ignored can be readily seen by a cursory reading of the attached opinions.

In so far as the *Slocum* case pertains to the effect of a general reversal without direction, we quote the following language of Mr. Justice Van Devanter appearing therein (33 S. Ct. page 537):

> "That judgment the Circuit Court of Appeals reversed and rightly so, because the defendant's request, in the state of the evidence, ought, as matter of law, to have been granted. *The reversal operated to set aside the verdict and to put the issues at large, as they were before it was given.*" (Italics ours.)

In substance the court decided that the Circuit Court of Appeals had no authority to direct judgment for the defendant, and that the Seventh Amendment of the Constitution made a new trial mandatory. This opinion was modified in *Baltimore and Carolina Line* v. *Redman, Inc.*, (1935) 295 U. S. 654, 55 S. Ct. 890, in so far as the power of the Circuit Court of Appeals to direct a judgment of dismissal under the particular circumstances was involved, Mr. Justice Van Devanter again writing the opinion. Pursuant to this modification placed upon the rule in the *Slocum* case, *supra*, the court later held in *Montgomery Ward & Company* v. *Duncan*, 311 U. S. 243, 61 S. Ct. 189, that *Rule* 50b merely rendered unnecessary a request for the reservation of the question of law on a motion for a directed verdict. It decided that in all cases brought under the new rules the reservation of the law question was automatic, and that,

therefore, from a procedural standpoint, all cases came within the rule of the *Redman* case, *supra*. In effect it decided that the appellate court has two alternatives, 61 S. Ct. at page 195:

> "The appellate court may reverse the former action and itself enter judgment *n. o. v.* or it may reverse and remand for a new trial for errors of the law."

In the instant case respondent neither waived nor withdrew its motion for a new trial, nor did it elect to stand only upon its motion *n. o. v.* on appeal. The Circuit Court of Appeals decided that on all of the evidence, the decedent was guilty of contributory negligence. However, it followed neither of the alternatives authorized in *Montgomery Ward & Company* v. *Duncan, supra*. Therefore we contend that pursuant to the unmodified portion of the *Slocum* decision, the case on remand rested as though no trial had occurred, and the District Court was bound to set it for trial upon its trial calendar instead of summarily entering judgment for respondent.

It is contended further that the decision in *Rodgers* v. *Hill* (1933) 289 U. S. 582, 53 S. Ct. 731, has also been ignored. We merely quote the pertinent part of that decision regarding the construction of mandates (53 S. Ct. p. 734):

> "Moreover, if the court intended to direct dismissal, it is presumed that it would have done so unequivocally and directly by means of language, form of decree and mandate generally employed for that purpose. But, assuming it included the opinion, the mandate would not prevent the district court in the exercise of a sound discretion from allowing plaintiff, were adequate showings made, to file additional pleadings, vary or expand the issues and take other proceedings to enforce the accounting sought by his bills of complaint. (Citing authorities)."

The absence in the opinion and mandate of the appellate court of any direction to enter judgment for the respondent is particularly significant when regarded in the light of the quoted language, and the full powers given courts of review under *Rule* 50b.

Conflict Among Circuit Courts of Appeal.

Prior to the enactment of the Federal Rules of Civil Procedure the Circuit Court of Appeals for the Eighth Circuit held in the case of *Illinois Power and Light Corp.* v. *Hurley* (1931) 49 F. 2d 681, at page 683 that:

> "The action being one at law the reversal of the judgment entitled the parties to a new trial of the action without restriction or limitation * * * This court, in reversing the prior judgment, did not purport to place any such conditions or restrictions upon plaintiff, and the trial court had no authority to require plaintiffs in a preliminary hearing before the court without a jury, to prove that they had a case for the jury."

An examination of this case reveals a trial and appellate history identical with the case at bar. In its opinion in the instant case (see appendix) the Circuit Court of Appeals neither analyzed, nor distinguished, nor even referred to the existence of such law, although it is a clear enunciation of a well recognized and uncontradicted rule.

After the adoption of the new rules the Circuit Court of Appeals for the Fifth Circuit rendered three opinions in accordance with the rule of the *Hurley* case, *supra; Madden Furniture, Inc.* v. *Metropolitan Life Insurance Company* (1942), 127 F. 2d 837; *Roth* v. *Hyer* (1944), 142 F. 2d 227, and *Fleniken, et al.* v. *Great American Indemnity Company* (1944), 142 F. 2d 938. Of these three cases, the current opinion of the Circuit Court of Appeals refers only to the *Madden Furniture* case, and then only to

quote a portion of the language of the decision not applicable to the question before it. It ignored the fact that the decision required a trial of the case *de novo*, and that the motions for judgment were held not reinstated, but stood disposed of.

In *Roth* v. *Hyer, supra,* the court said at page 228:

> "Generally when a case is reversed and remanded for further proceedings, it goes back to the trial court and there stands on the issues as if the former trial had not taken place. In the absence of any direction limiting the new trial to particular issues the whole case is tried anew, in pursuance of the principles of law disclosed in the opinion of the appellate court which must be regarded as the law on the second trial."

In the *Fleniken* case a verdict was reversed because a motion for a directed verdict should have been granted. On remand the court entered judgment for the defendant. On further appeal the court held that the District Court erroneously construed the mandate, and that plaintiff was entitled to ask for a trial *de novo*. With this decision in mind we call the court's attention to the statement of the District Court in the present case from which we quote as follows (Tr. page 5):

> "In that connection the plaintiffs argue that they should be given the opportunity to adduce additional evidence to supply the deficiency found by the Appellate Court, or to explain away the evidence found to bar the one plaintiff's recover. The answer is that had the District Court ruled at the trial as the Circuit Court of Appeals held it should have ruled, such opportunity as now requested could not have been afforded."

There can be no question but that the decisions mentioned above clearly establish the right of your petitioner to a new trial upon the general reversal of her verdict

and judgment; or, at least, her right to present to the District Court considerations which might warrant the granting of a new trial, if it be regarded as a discretionary matter. Not only has the Circuit Court of Appeals ignored the decisions cited, but it has failed to cite a single authority to the contrary among the ten authorities mentioned.

Its decision, therefore, stands alone and in direct conflict with the cases discussed.

Departures in Procedure.

The District Court without anything before it other than the mandate and opinion of the reviewing court summarily entered judgment in favor of the defendant upon its motion (Tr. 6). Since the mandate contains no express direction, the only theory to sustain its action is that there was an implied direction to so enter judgment. The Circuit Court of Appeals sanctioned this so-called direction by implication:—"We think the court correctly construed the opinion and mandates and properly disposed of appellants' contentions" (Tr. 22). But there was nothing before the court upon which it could act affirmatively under the then existing procedure. The motion for judgment *n. o. v.* was not re-instated by the reversal but stood disposed of. *Madden Furniture, Inc.* v. *Metropolitan Life Insurance Co., supra.* As stated in *Fleniken* v. *Great American Indemnity Company, supra,* at page 939:

> "The reversal on appeal of said final judgment, with a remand for further and not inconsistent proceedings, did not reinstate the motion of the defendant for a directed verdict and, in the alternative, for a new trial, which motion had been overruled before the appeal was taken."

The decision sought to be reviewed is, thus, a substantial departure from existing practice.

A further departure of a substantial nature is sustained by the opinion of the Circuit Court of Appeals. Petitioner was apparently penalized, as reflected in the opinion, because she "made no offer to produce any evidence not before heard" (Tr. 22). The Circuit Court also stated: "Comparing *Madden Furniture, Inc.* v. *Metropolitan Life Insurance Co.* * * * after the mandate had been filed appellants offered to exhibit evidence not before heard which might produce a different result" (Tr. 22).

With regard to the *Madden* case the Circuit Court merely seized upon a statement from the reviewing court's resume' of the facts to justify its affirmance here, because the court in the *Madden* case makes no comment in the body of the opinion upon the propriety or impropriety of such a preliminary showing. That your petitioner was between "Scylla and Charybdis" is shown by the trial court's views in the matter:

> "In that connection plaintiffs argue that they should be given the opportunity to adduce additional evidence * * * to explain away the evidence found to bar plaintiff's recovery. The answer is that had the District Court ruled at the trial as the Circuit Court of Appeals held it should have ruled, such opportunity as now requested could not have been afforded" (Tr. page 5).

The prior written law on this subject is clearly stated in *Illinois Power and Light Co.* v. *Hurley, supra,* pages 683 and 684:

> "The defendant however interposed a motion to dismiss, unless plaintiffs should show that they had available additional noncumulative evidence, pertinent and substantial and newly discovered, and un-

> obtainable at the time of the prior trial. • • • Counsel cite new authority for such a procedure, and we conclude that there is none. Such a procedure would seem to be in direct violation of the Seventh Amendment of the Constitution. (Citing *Slocum* case and others) • • • the trial court had no authority to require plaintiffs, in a preliminary hearing before the court and without a jury, to prove they had a case for the jury. The motion was not only unique but, we think *was properly treated as frivolous.*" (Italics ours.)

As mentioned, a fair interpretation of the opinion in the first appeal is that the District Court erred in its denial of the motion for a directed verdict as re-urged in the motion *n. o. v.* and in the alternative the motion for new trial, although the court in the majority opinion did not refer to any specific rulings. That there was a substantial difference of opinion, even in the reviewing court, is indicated in the dissenting opinion. The trial court, at least, was satisfied that a fair trial had been had, and that the verdict was in accordance with the weight of the evidence, since it denied defendant's motion for new trial as well as the motion *n. o. v.* (Tr. 4).

The above suggested procedures present baffling problems to practicing attorneys in the trial courts. Apparently, a successful litigant must impeach a favorable verdict and judgment to insure against a general reversal because the only provisions for a motion for new trial (Rules 50b & 59) (in which the prejudicial rulings of the court could be urged) requires it to be filed within ten days after verdict or judgment. The pre-jury presentation of evidence after a general reversal would lead to so many ramifications as to make it futile upon its face.

Erroneous Construction of Rule 50b.

Without setting out the terms of the rule, its apparent primary purpose is to permit the trial court to reflect upon the merits of a plaintiff's case after the immediate problems arising during the actual trial have been disposed of. (See Rule 50b, appendix.) By judicial interpretation this rule has given the reviewing court power to finally dispose of jury trials where the interests of justice so require. The decision in the present case construes the rule to permit the redelegation of that power back to the trial court. The result is apparent. It then becomes an instrument for the prevention of re-trials—whether necessary, meritorious, or otherwise—depending upon the pressing nature of the particular court's calendar at the time the problem arises.

The Seventh Amendment.

As so ably stated by the late Mr. Justice Van Devanter in the *Slocum* case, *supra,* the constitutional right to a trial by jury of issues of fact in civil cases has always been guarded with jealousy by this Honorable Court. The committee of judges and lawyers that recommended the adoption of *Rule* 50b by this court was fully aware of its possible abuse in so far as the denial of the right to a jury trial was concerned. * The record and opinions sought to be reviewed here present a most clear illustration of that feared abuse.

---

* See order of this court under date of June 3, 1935, October Term, 1934, appointing advisory committee.

Conclusion.

Your petitioner is not seeking to re-argue the evidence in her case in this court. She has brought to this Honorable Court's attention an ignoring of precedents by the Circuit Court of Appeals for the Seventh Circuit, a conflict of decisions among the circuits, wide departures in the practice not heretofore sanctioned, a new and erroneous construction of the Federal Rules of Procedure, and a violation of the Constitution by judicial decision, all of which pertain to a question of procedure and practice of grave and general importance to the bench and bar.

For all of which reasons, your petitioner prays that her petition be granted.

Josephine M. Moss, Administratrix
of the Estate of Nicholas John
Moss, Deceased,

By Owen W. Crumpacker,
Jay E. Darlington,
Her Attorneys.

FREDERICK C. CRUMPACKER,
Of Counsel.

APPENDIX.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

No. 8549 October Term and Session, 1944.

JOSEPHINE M. MOSS, Administratrix of the Estate of Nicholas John Moss, Deceased,
Plaintiff-Appellee,
vs.
THE PENNSYLVANIA RAILROAD COMPANY,
Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Indiana, Hammond Division.

January 3, 1945.

Before EVANS, KERNER, and MINTON, Circuit Judges.

This appeal necessitates our determination of liability for the death of Nicholas J. Moss, who was killed when the automobile he was driving was struck by defendant's fast moving train at a crossing in the incorporated town of Shererville, Indiana. The administratrix of his estate brought this action to recover damages for his death, allegedly caused by defendant's negligence. Defendant denied negligence and charged deceased with want of ordinary care, which caused or at least contributed to the accident and to his death.

The trial court submitted the case to a jury, who returned a verdict for plaintiff. The entry of a judgment on the verdict provoked this appeal.

EVANS, Circuit Judge. We approach the case on the hypothesis that where the sufficiency of the evidence to support the verdict is the only controverted issue, only evidence most favorable to the plaintiff will be considered. Likewise narrowing the fact study is our acceptance of plaintiff's evidence as sufficient to establish her charge of negligence on defendant's part.*

Thus narrowed, our only inquiry is one of contributory negligence.

The accident occurred about 3 P. M., December 6, 1941, on a somewhat dark, but stormless day. The deceased drove his automobile along the Austin highway from the south, on to defendant's right of way, and in front of an oncoming train. In doing so he was struck and fatally injured. He never regained consciousness although he lived several days.

Ordinarily, this simple undisputed factual statement would settle the question of liability. Unexplained, the facts establish contributory negligence as a matter of law. Plaintiff, however, offers an explanation of deceased's conduct. At least an attempt to do so is made. It is based on the theory of an unobstructed view of the oncoming train. The nature of the alleged obstruction and its effect as an excuse for the deceased's action, therefore, become the precise question of our inquiry.

That an obstruction of the view of a rapidly moving train may explain or excuse the traveler from what would otherwise be negligence, is not debatable. *Pokora* v. *Wabash Ry. Co.*, 292 U. S. 98.

---

* Four witnesses testified that the whistle on the engine was blown. Two witnesses testified that they did not hear any whistle.

The query then is, What are the facts in the instant case? In an effort to answer this query, we have assumed:

(a) In applying the law, each case must be determined by its own facts.

(b) The law as announced by the Indiana state courts, governs.

(c) The controversy here, as in most personal injury cases, is not over the applicable law, for the decisions are quite uniform, but involves a study of the facts peculiar to this case and the application of settled Indiana law thereto.

Controversy, if any, must spring from an attempt to ascertain the undisputed facts and supplement them by the controverted facts construed by us most favorably to the plaintiff.

Here reproduced are two photographs.

One shows the situation at the crossing where the accident occurred. The other is a view of the railroad right of way and the tracks as the traveler approached the crossing. It purports to show the distance (a mile) the traveler, approaching from the south, could see down the railroad right of way, and also to show the absence of any obstruction, when the photographer stood forty-four feet from the nearest rail over which train moved.

The only possible dispute is over the number of feet the photographer stood south of the track.

The evidence is that as the deceased continued his way along the Austin highway and approached the railroad right of way, he reached a point where there was some obstruction to his view. To his right, a rise of land, referred to as a mound or knoll, partially obstructed the

view. It was several feet high (maximum of 9 feet) and upon it grass had grown. It extended parallel to the right of way about two hundred feet and was about a hundred feet wide. Measurements vary, because of difference over place where land begins to rise.

The knoll did not completely obstruct the view of an oncoming train from the south, however, and one riding in an automobile on the road could see the top of the train over the top of the knoll. The extent of the obstruction when the traveler is behind the mound is not the determining factor in the defense of contributory negligence, however. As the traveler approached the track, he reached a point where the obstruction, or partial obstruction, to-wit, the mound or knoll, no longer interfered with a traveler's view of the track or an oncoming train. As the mound subsided and the land became level again, nothing obstructed the view.

The exact distance which marks this spot where clear vision began, thus becomes the important and determinative question in the case.

Counsel do not agree upon the distance such spot was from the railroad tracks. Both do agree, and must agree, that there was such a spot, which the deceased reached before he came to the tracks—a spot where he could clearly see the oncoming train. Not only the testimony but the photographs, establish this fact as a verity. There is no controversy, either, as to the general correctness of the photographs, once the traveler reached the point where he could look down the track.

Actual measurements were taken by witnesses for the defendant and their testimony is undisputed, save by one witness upon whom plaintiff relies to make the question one for the jury. He gave it as his estimate, based upon an observation after the accident, that it was from

twenty to thirty feet from the south rail of the track traveled by the train. The measurements given by the other witnesses were as follows: At forty-four feet from the track, the traveler could see the overhead bridge a mile away. The photograph, so they said, was taken with the photographer forty-four feet from said rail.

Placing the camera in the center of the road, fifty-five feet from the south rail, a man standing in the center of the track in question, could be seen six hundred seventy feet from the crossing. The same test was made at fifty feet from the same rail and the man could be seen nine hundred thirty-five feet down the track. At forty-four feet one could see as far as his sight would permit. The overhead bridge, a mile away, was observable.

The factual issue which is determinative of the case then, is the distance from the track to a spot where deceased's view was still unobstructed. That there was such a spot is certain.

The various witnesses who made the measurements fixed that point at a distance from the said rail, considerably more than the estimate of the one witness for the plaintiff, who approximated it at twenty to thirty feet.

The testimony of plaintiff's witness is important and we quote it:

> "Question * * * When you came up to 55 and 45 feet from the north track there, * * * I will ask you whether or not it is not a fact that you can pass the corner of the knoll and you have a view way down the track to the east.
>
> "Answer: Yes, at some point there you can see the train coming at some distance.
>
> "Question: What point, and what distance?

"Answer: At a point I would say about 30 feet, 20 to 30 feet probably before you approach the track, I made no exact measurements as to distance. I am not sure as to the number of feet that it takes for you to see down this track. I never made any measurements."

The testimony of this witness and those who made the actual measurements may not be said to be in conflict. The testimony of one who estimates and allows for a range of ten feet is reconcilable with an actual measurement of 44 feet. So accepting it, we have the deceased traveling in a car at a rate of ten to fifteen miles an hour, approaching a railroad track, the existence of which he knew, without stopping. The approaching train composed of two engines and thirteen passenger cars and traveling seventy miles per hour, was a few hundred feet away. Yet he drove on the track in front of the oncoming train.

Either he was in hopes that he would get across the track before the engine reached the spot, or he did not look to the right as he approached the track. That he could have stopped before he reached the track, in twenty feet, is, we believe, a matter of common knowledge.

The Indiana statute has imposed an additional duty upon the traveler. It does not make the action of the ordinary man the test of the traveler's duty. It mandatorily called on the traveler to stop when approaching a crossing. The evidence of all witnesses who saw deceased approach the track was that the deceased did not stop.

The statute, omitting inapplicable provisions, reads:

"47-2114. Obedience to Signal Indicating approach of train.—Whenever any person driving a

vehicle approaches a railroad grade crossing, the driver of such vehicle shall stop within fifty feet but not less than ten feet from the nearest track of such railroad and shall not proceed until he can do so safely, when:

"(a) • • •

"(b) • • •

"(c) • • •

"(d) An approaching train is plaintily visible and is in hazardous proximity to such crossing."

The deceased failed to comply with this statute. His failure to stop is a violation of the statute somewhat similar to defendant's action in driving its train faster than fifteen miles through this town. Defendant's violation of the town's speed ordinance established negligence on the part of the defendant. Plaintiff's failure to comply with the statute carried like consequences. At least we find it hard to escape this reasoning. We are not the judge of the wisdom of this rather harsh statute. Its wisdom is for the Indiana Legislature. Moreover, its scope and effect are for the Indiana courts. As we read, construe, and apply it, a serious obstacle has been erected by it in plaintiff's path to recovery.

We are, however, not placing our decision upon this statute. There seems to be uncertainty in Indiana courts as to this statute's proper construction and application. We ignore it because as we view the evidence we must reach the same conclusion without relying on it.

Ignoring this statute, it still seems to us clear that deceased should have stopped, rather than have driven on the track in front of the engine.

In reaching this conclusion we are taking the most favorable and charitable view of deceased's action, namely, that he did not endeavor to race with the engine, but rather that he failed to look and therefore failed to

see the oncoming train. We are accepting the estimate of plaintiff's witness rather than the measurements of defendant's witnesses, solely on the theory that it is the testimony most favorable to plaintiff that can be found in the record.

He should have looked. He must be charged with the information which he would have received had he looked.

There is one fact thus far not mentioned, which plaintiff has properly stressed and which we have not overlooked. The railroad tracks and the highway did not cross at right angles. The highway ran north and south. The railroad right of way ran southeast and northwest. The train which struck Moss was coming from the southeast at an angle of about forty-five degrees. To have seen it coming the deceased would have had to turn his head further than if it crossed at right angles. The train was obviously, clearly and warningly observable. The duty of the traveler was to look, not merely at right angles, but down the path of the right of way. He can not be excused for not looking as he approached the railroad double track with intent to pass over it. Had he looked he could not have failed to see the train. As it traveled the last six hundred feet before reaching the crossing, it was almost as clearly observable as if the tracks ran at right angle to the highway. The photograph supports common observation in making this statement.

The conclusion which we have reached seems to us to be unavoidable. Deceased drove his automobile out in front of an oncoming train which he must have seen had he looked. He met the inevitable fate which such action forecast. The accident is distressing, most unfortunate, but liability must be measured by the facts.

The judgment is Reversed.

Kerner, C. J. Dissenting.

The accident occurred at the Austin Avenue crossing, a principal north and south street in the town of Schererville, Indiana, in which town there was in effect an ordinance limiting the speed of railroad trains to 15 miles per hour. This street intersects defendant's railroad, consisting of two tracks extending in a northwesterly and southeasterly direction. The tracks intersect Austin Avenue at an acute angle. The tracks are at road level, but there was a knoll 9 feet above track level upon which there were weeds extending from 1½ feet to 5 feet in height. The knoll was 200 feet long paralleling the track and was 32 feet from the south rail of the westbound or north track. Due to this knoll the vision of a driver coming from the south on Austin Avenue is somewhat obscured. The first view to the right of southeast, obtainable by a person driving north, is from a point 20 feet south of the westbound of northernmost track. (See testimony of Schinourd, page 29, transcript of record.)

It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel other results are more reasonable. *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 35.

Photographs are not conclusive to such an extent that evidence in conflict with them will be ignored. They are no more conclusive of physical facts than the testi-

mony of witnesses. It is for the jury to determine their weight and reliability by the same test used in weighing other evidence. *Pettibone* v. *Howard,* 218 Ind. 543, 546. Whether decedent had a view of the approaching train at any time prior to the collision was a disputed question of fact, and where there is conflict between photographs and oral testimony it is within the province of the jury to consider both the photographs and the conflicting oral testimony as well as all other conditions and circumstances shown by the evidence, and its determination is conclusive. *Bartley* v. *Chicago and Eastern Illinois Ry. Co.,* 216 Ind. 512.

Defendant admits that decedent's view to the southeast was partially obstructed by the knoll and that in operating the train at a speed of 65 to 70 miles per hour, in violation of the terms of the town ordinance, it was guilty of negligence. The verdict necessarily found not only that decedent exercised all the care which an ordinarily prudent and cautious person would use under like circumstances and conditions to avoid injury, but it also found that no signal or warning of any kind was given of the approaching train. We must accept as a verity that the first possible view or knowledge the decedent could have had of the approach of the train was when he had arrived at a point 20 feet south of the track upon which the train was approaching.

The courts of Indiana have held that in negligence cases there is no presumption that either party was or was not negligent, and neither courts nor juries have any right to presume any fact in issue which they are called upon to determine, *Pennsylvania R. Co.* v. *Lytle,* 109 Ind. App. 318, 327; *Baltimore & Ohio R. Co.* v. *Reyher,* 216 Ind. 545, 549; and *Heiny* v. *Pennsylvania R. Co.,* 221 Ind. 367, 373. They have repeatedly said that contrib-

utory negligence is a question of fact for the jury, and that it is only in cases where the facts are undisputed and where only a single inference can be reasonably drawn from the facts that the court can say, as a matter of law, that a certain course of conduct does, or does not, constitute contributory negligence, *Cushman Motor Delivery Co.* v. *McCabe,* 219 Ind. 156; *Baltimore & Ohio R. Co.* v. *Reyher, supra;* and *Bartley* v. *Chicago & E. I. Ry. Co., supra.* They have declared as a matter of law that ordinary care requires a person about to cross a railroad track to use his senses of sight and hearing, but they have never said that he must stop or that he must look or listen at any particular place, *Central Indiana Ry. Co.* v. *Wishard,* 186 Ind. 262, and *Bartley* v. *Chicago & E. I. Ry. Co., supra.* He is required to exercise ordinary care to select a place where the act of looking and listening will be reasonably effective, but the point, in its precise relation to the track in feet, is seldom to be determined as a matter of law. *Pittsburgh, etc. Ry. Co.* v. *Dove,* 184 Ind. 447.

It is intimated that decedent was guilty of contributory negligence as a matter of law, in that he failed to stop his automobile within 50 but not less than 10 feet of the crossing, as required by statute. Burns' Ann. St. 1933, 47-2114.

The Supreme Court of Indiana had occasion to discuss an interpret a somewhat similar statute, in which a like contention was made. In that case the court held the case was basically a common-law action; that the decedent's conduct was to be measured by the standard of ordinary care; and that in Indiana no degrees of actionable negligence are recognized other than that which results from the failure or refusal to exercise ordinary care. *Heiny* v. *Pennsylvania Railroad Co.,* 221 Ind. 367.

The burden of proof as to contributory negligence is on the defendant, 2-1025 Burns' Ann. St. 1933. My colleagues are of the opinion that they can say as a matter of law that decedent was guilty of contributory negligence. It seems to me that in reaching this conclusion they overlook and fail to apply the principles enunciated in the cases cited in this opinion.

There was no evidence that decedent was familiar with the crossing. In fact there was evidence tending to prove that he was unfamiliar with the crossing. His conduct was to be measured by the standard of ordinary care, which required him to look and listen. There was no evidence that he was not looking when he was 20 feet from the north track. True it is, he could have seen the approaching train had he looked to the southeast immediately after he had reached a point 20 feet from the north track. But the courts of Indiana have said that the look and listen rule could not be inflexibly applied in all cases, *Stoy* v. *Louisville, etc. R. Co.*, 160 Ind. 144, and that the rule did not require that decedent look or listen at a particular place, in a particular direction, at almost a particular instant of time, irrespective of other conditions. *Cleveland, etc. R. Co.* v. *Lynn*, 177 Ind. 311 318. Consequently, decedent could not be charged with contributory negligence as a matter of law, because he did not look to the southeast immediately before he was struck by the train. *Penn. R. R. Co.* v. *Hemmer*, 206 Ind. 311. Under such circumstances, the question whether decedent was guilty of contributory negligence was for the jury.

Moreover, in this case, decedent was entitled to assume defendant would sound a whistle announcing the approach of the train and that the train would not be operated in violation of the town ordinance, *Chicago, etc.*

R. Co. v. *Daun*, 53 Ind. App. 382. No warning was given by blowing a whistle and the train was traveling 65 miles per hour or 93 1/3 feet per second, while the decedent was traveling 10 miles per hour or 14 2/3 feet per second. The failure to sound a whistle and the operation of the train in violation of the town ordinance, together with all the other evidence in the case, were factors to be considered in determining the question of contributory negligence. *Malott* v. *Hawkins*, 159 Ind. 127, 135.

I would affirm the judgment.

(Certificate of Clerk.)

IN THE

DISTRICT COURT OF THE UNITED STATES

HAMMOND DIVISION

FOR THE NORTHERN DISTRICT OF INDIANA

JOSEPHINE M. MOSS, Administratrix of the Estate of Nicholas John Moss, Deceased, Plaintiff, vs. THE PENNSYLVANIA RAILROAD COMPANY, Defendant.	No. 397 Civil.
DELLA HOOK, Administratrix of the Estate of Jacob Hook, Deceased, Plaintiff, vs. NATIONAL BRICK COMPANY, a corporation, Defendant.	No. 418 Civil.

Memorandum Opinion.

Both Moss v. Pennsylvania Railroad Company and Hook v. National Brick Company were actions to recover damages for the deaths of the Plaintiffs' decedents alleged to have been caused by the negligence of the respective defendants, and both cases were tried by jury.

At the close of all the evidence in the Moss case, the defendant railroad company filed a motion for a directed verdict which was overruled. The jury returned a verdict for the plaintiff upon which judgment was entered.

The defendant then filed a motion for a new trial and in the alternative for judgment on its motion for a directed verdict. This motion was denied.

At the close of the plaintiff's evidence in the Hook case, the defendant brick company filed a motion for a directed verdict which was overruled. The jury returned a verdict for the plaintiff. The defendant then filed a motion for a new trial and also a motion for judgment *non obstante veredicto*. The latter motion was overruled, and judgment was entered on the verdict.

Both of these cases were reversed on appeal. The defendants now move for judgment on the mandates, but the plaintiffs contend that they are entitled to new trials.

The only question presented is the effect of the mandates; that is, whether, in the absence of direction by the appellate court to enter judgments for the defendants, new trials should be ordered. Plaintiffs' counsel are not contending that the appellate court could not have directed judgments to be entered for the defendants on the record and under the provisions of Rule 50 (b) of the F. R. C. P. Their contention is rather that the simple reversal of the judgments for the plaintiffs does not, in the absence of further mandatory directions, authorize the entry of judgments for the defendants.

In construing the mandate of the Circuit Court of Appeals, the opinion may and should be considered, *Thornton* v. *Carter*, 8 Cir., 109 F. (2d) 316, 319, because it is a part of the mandate. *Pike Rapids Power co.* v. *Minneapolis, St. P. & S. S. M. Ry. Co.*, 8 Cir., 106 F. (2nd) 891, 893.

In both the instant cases, the appellants assigned as error the overruling of the motions for directed verdict

and the denial of the motions for judgment notwithstanding. In the Moss case, the appellate court held that as a matter of law the plaintiff's decedent was guilty of contributory negligence, and in the Hook case, it held that "the proof fails to sustain the negligence alleged in the complaint." In other words, the upper court ruled in effect that the District Court should have directed verdicts or should have granted the motions for judgment *non obstante veredicto.*

That being so, when the Circuit Court of Appeals reverses the judgments, it is in effect saying that the rulings on the motions for judgment notwithstanding should be different than they were in the first instance.

It is my view that Rule 50 (b) was included in F. R. C. P. in order that unnecessary retrials may be avoided when the trial court erroneously overrules a motion for directed verdict. In that connection, the plaintiffs argue that they should be given the opportunity to adduce additional evidence to supply the deficiency found by the appellate court or to explain away the evidence found to bar the one plaintiff's recovery. The answer is that had the District Court ruled at the trial as the Court of Appeals held it should have ruled, such opportunity as now requested could not have been afforded.

The plaintiffs have cited *Madden Furniture, Inc.* v. *Metropolitan Life Insurance Co.*, 5 Cir., 127 F. (2d) 837, as authority for their position. Although one of the alleged errors in that case was a motion for directed verdict, the motion for judgment *non obstante veredicto* was not assigned as error, and the appellate court pointed out in its opinion that it "did not reverse or even review the judgments of the trial judge on the motions for judg-

ment *non obstante veredicto.*" It further said, "The opinion mentions only the alleged errors prior to verdict." This is not the present situation. Here, the motions for judgment *non obstante veredicto* were assigned as error as were the motions for directed verdict, and, in my view, the appellate court reviewed the questions presented by these rulings and then reversed. Under Rule 50 (b), the question of law raised for later redetermination on a motion for judgment notwithstanding. This redetermination was made after verdict in the instant cases, and thereafter the Circuit Court reversed on grounds raised by these motions. Under such circumstances, the question now before the court must be resolved against the plaintiffs.

The Clerk is directed to enter judgments on the mandates in favor of the defendants.

Luther M. Swygert,
Judge.

Moss, Admnx.
v. 9071
Pennsylvania

Hook, Admnx.
v. 9072
National Brick Co.

Circuit Court of Appeals, Seventh Circuit.

Appeals from the District Court of the United States for the Northern District of Indiana, Hammond Division; Luther M. Swygert, Judge.

Action by Josephine M. Moss, administratrix of the estate of Nicholas John Moss, deceased, against the Pennsylvania Railroad Company and action by Della Hook, administratrix of the estate of Jacob Hook, deceased, against the National Brick Company, a corporation. From judgments in favor of the defendants, 68 F. Supp. 740, the plaintiffs appeal.

Affirmed.

Owen W. Crumpacker, Jay E. Darlington and Frederick C. Crumpacker, all of Hammond, Ind., for appellants.

Fred E. Zollars, J. A. Bruggeman, and Phil McNagny all of Fort Wayne, Ind. (Barrett, Barrett & McNagny, of Fort Wayne, Ind., of counsel), for Pennsylvania R. Co.

Robert H. Moore (of Moore, Regan & Goad) of Gary, Ind., and William Greene, of Chicago, Ill., for National Brick Co.

Before Major, Kerner, and Minton, Circuit Judges.

Per Curiam.

These are second appeals in cases which were before this court in 7 Cir., 146 F. 2d 673 and 7 Cir., 150 F. 2d

184, where the facts are fully stated. In both cases the error assigned was the overruling of a motion for a directed verdict and the denial of a motion for judgment notwithstanding the verdict. In the *Moss* case this court held, as a matter of law, that plaintiff's decedent was guilty of contributory negligence, and in the *Hook* case, that the proof failed to sustain the negligence alleged in the complaint. In both cases the opinion of the court concluded thus: "The judgment is reversed." D. C., 68 F. Supp. 740. Mandates were issued in which the District Court was commanded that "such proceedings be had in the cause, as according to right and justice, and the laws of the United States, ought to be had, the said judgment notwithstanding."

In the District Court, after the filing of the mandates, plaintiffs made no offer to produce any evidence not before heard, but each plaintiff contended that because the judgment did not embody a direction to enter judgment for defendant a new trial should be ordered. The trial judge held that he could take no action contrary to either the letter or the spirit of the mandate, as explained by the opinion; that this court in each case had ruled that the District Court should have directed a verdict for the defendant or should have granted the motion for judgment notwithstanding the verdict. Accordingly he entered judgment in each case in favor of defendant.

We think the court correctly construed the opinions and mandates and properly disposed of appellants' contentions. *Pike Rapids Power Co.* v. *Minneapolis, St. P. & S. S. M. Ry.*, 8 Cir., 106 F. 2d 891; *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654, 55 S. Ct. 890, 79 L. Ed. 1636; *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, 61 S. Ct. 189, 85 L. Ed. 147; *Thornton* v. *Carter*, 8 Cir., 109 F. 2d 316; *Lowden* v. *Denton*, 8 Cir., 110 F. 2d 274

278; *Conway* v. *O'Brien*, 2 Cir., 111 F. 2d 611, 613; *Brunet* v. *S. S. Kresge Co.*, 7 Cir., 115 F. 2d 713; *Southern R. Co.* v. *Bell*, 4 Cir., 114 F. 2d 341; and *Herzberg's, Inc.* v. *Ocean Accident & Guarantee Corporation*, 8 Cir., 132 F. 2d 438. Compare *Madden Furniture, Inc.* v. *Metropolitan Life Ins. Co.*, 5 Cir., 127 F. 2d 837, in which case the overruling of the motion for judgment notwithstanding the verdict was not specified as error, and after the mandate had been filed, appellants offered to exhibit "evidence not before heard which might produce a different result".

Affirmed.

Rule 50. Motion for a Directed Verdict.

(b) Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.